

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DAVID LAWRENCE WEIRICH,  
  
Plaintiff,  
  
v.  
  
BOARD OF GOVERNORS OF THE  
FEDERAL RESERVE SYSTEM,  
  
Defendant.

NO. CV-10-5031-EFS

**ORDER HOLDING IN ABEYANCE  
DEFENDANT'S MOTION TO DISMISS  
AND ORDERING SUPPLEMENTAL  
BRIEFING**

Before the Court, without oral argument, is Defendant Board of Governors of the Federal Reserve System's ("the Board") Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. [9](#)). Having reviewed the submitted materials and relevant authority, the Court is fully informed. For the reasons set forth below, the Court holds in abeyance the Board's motion and requires the Board file supplemental briefing.

**I. Background**

In August 2009 and during the global economic crisis, Plaintiff David Weirich sent three emails to the Board under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 seeking information on the Board's

1 involvement in extending loans to a number of businesses and industries,  
2 including several of the world's largest investment banks.

3 On August 2, 2009, Mr. Weirich sent an email to the Board's Freedom  
4 of Information Office ("FOI Office") seeking:

5 any documents of meetings held by, or discussions between, any  
6 members of the Federal Reserve concerning why emergency funds  
7 were given to commercial banks which were nearly insolvent,  
8 instead of requesting the FDIC to intervene near the point of  
9 insolvency, as required by Section 11 of the Federal Deposit  
10 Insurance Act.

11 (ECF No. 10-1, Ex. A.) On August 4, 2009, the FOI Office acknowledged  
12 Mr. Weirich's letter, *id.* Ex. B, and on September 1, 2009, sent an  
13 extension letter in accordance with FOIA § 552(a)(6)(B)(i), informing Mr.  
14 Weirich that an additional ten days would be required to respond, *id.* Ex.  
15 C.

16 On September 15, 2009, Mr. Weirich sent a second email to the FOI  
17 Office seeking:

18 (a) Federal Reserve standards pertaining to the extension of  
19 credit in real estate loans by member banks. Per 12 U.S.C.  
20 section 1828(o)(2)(A)(i), Federal banking agencies shall  
21 consider 'the risk posed to the Deposit Insurance Fund by such  
22 extensions of credit;'

23 (b) Federal Reserve standards of member banks in purchasing  
24 real estate loans from other banks, savings associations or any  
25 other financial institutions. This is one of the key issues  
26 in the 'toxic asset' problem, where member banks purchase the  
loans of other banks and receive the loan proceeds. Once  
member banks have purchased such real estate loans, this is  
essentially the same as the member banks extending the credit  
initially (since the banks receive the proceeds of the real  
estate loans following the purchase), and such purchases should  
therefore be regulated in the same manner as extension of  
credit is regulated per 12 U.S.C. section 1828(o)(2)(A)(i);

(c) Where in U.S. Code the Federal Reserve is tasked with  
maintaining a market for the purchase and sale of real estate  
loans. Although member banks are authorized to purchase and  
sell real estate loans, I fail to see in the code where the  
Federal Reserve is given authority to maintain and/or subsidize  
such market in the event of a downturn in such market; and

1 (d) Any meetings of any members of the Federal Reserve  
2 regarding regulating the purchase and sale of real estate loans  
3 by member banks. Although such purchase and sale is permitted  
4 under Title 12, it is curious that a member bank should want  
5 to sell its loans unless the bank has a short-term liquidity  
6 problem; after all, should not the primary business of banks  
7 be in providing deposits and managing loans, not in selling  
8 loans for profit?

9 *Id.* Ex. E. On September 16, 2009, the FOI Office acknowledged Mr.  
10 Weirich's letter, *id.* Ex. F, and on October 14, 2009, sent a ten-day  
11 extension letter, *id.* Ex. G.

12 On November 2, 2009, Mr. Weirich sent a third email seeking:

13 [a]ny documents showing any discussion/debate any member of the  
14 Federal Reserve may have had from August 2008 onward concerning  
15 whether or not it was appropriate for the Federal Reserve to  
16 bail out firms such as AIG and JP Morgan/Bear Stearns, instead  
17 of allowing such firms to settle their troubles in Chapter 11  
18 bankruptcy.

19 *Id.* Ex. I. On November 10, 2009, the FOI Office acknowledged Mr.  
20 Weirich's letter, *id.* Ex. J, and on December 2, 2009, sent a ten-day  
21 extension letter, *id.* Ex. G.

22 After reviewing Mr. Weirich's requests and consulting with staff,  
23 the FOI Office concluded that, with the exception of items (a) and (b)  
24 of Mr. Weirich's September 15, 2009 request, Mr. Weirich's requests were  
25 not specific enough to allow staff to process them without unduly  
26 burdening or significantly interfering with the Board's operations. *Id.*  
Exs. D, H, L.

27 In the meantime, Mr. Weirich filed this action, seeking a Court  
28 order requiring the Board to respond to his FOIA requests. (ECF No. [1](#).)  
29 In his March 23, 2010 Complaint, Mr. Weirich alleges that the Board's  
30 failure to respond to his requests within the ten-day extension period  
31 violated 5 U.S.C. § 552 and 12 C.F.R. § 261. He further claims that he:

1 1) telephoned the FOI Office to receive an update on his FOIA requests,  
2 2) informed the Office of Inspector General of the Board's failure to  
3 comply, and (3) requested assistance from Senator Maria Cantwell. *Id.*  
4 at 3.

5 But it was not until after the ten-day extensions had expired that  
6 the Board finally responded. By three letters dated April 20, 2010, the  
7 Board sought clarification on Mr. Weirich's August 2 and November 2, 2009  
8 requests. It also responded to items (a) and (b) of his September 15,  
9 2009 request,<sup>1</sup> noted that (c) was not a proper FOIA request, and sought  
10 clarification on (d). *Id.* Ex. D, H, L. In each of these letters, the  
11 Board advised Mr. Weirich that a FOIA request "must reasonably describe  
12 the records in a way that enables the Board's staff to identify and  
13 produce the records with reasonable effort and without unduly burdening  
14 or significantly interfering with any of the board's operations," and  
15 that Mr. Weirich's request, as written, was too vague to process. *Id.*  
16 The letters asked Mr. Weirich to revise his requests by May 18, 2010, or  
17 they would be closed. *Id.* Mr. Weirich did not respond to the Board's  
18 requests for clarification, and the FOI Office administratively closed  
19 all three of Mr. Weirich's requests. On August 26, 2010, the Board filed  
20 the motion under consideration.

---

21  
22 <sup>1</sup> In responding to items (a) and (b), the Board by identified  
23 twenty-eight (28) references to websites providing information on  
24 "Federal Reserve standards pertaining to extension of credit in real  
25 estate loans by member banks" and "Federal Reserve standards of member  
26 banks in purchasing real estate loans from other banks, savings  
associations or any other financial institutions." *Id.* Ex. H.

## II. Discussion

The Board moves under Federal Rule of Civil Procedure 12(b)(1) to dismiss the action for lack of subject-matter jurisdiction because Mr. Weirich failed to exhaust his administrative remedies. Mr. Weirich did not respond.<sup>2</sup> Because the Court finds Mr. Weirich did not fail to exhaust his administrative remedies, the Board's motion is denied.

### A. Standard

Under Federal Rule of Civil Procedure 12(b)(1), the defense of lack of subject-matter jurisdiction must be asserted either by answer or by motion. If by motion, Rule 12(b) states that such a motion "must be made *before pleading* if a responsive pleading is allowed." Fed. R. Civ. P. 12(b) (emphasis added). In this case, the Board filed its Rule 12(b)(1) motion to dismiss *after* asserting the affirmative defense of lack of subject-matter jurisdiction in its Answer (ECF No. 7).<sup>3</sup>

Courts are split as to whether a Rule 12(b)(1) motion, which is commonly referred to as a "pre-answer" motion, is the proper procedural vehicle for attacking subject-matter jurisdiction *after* an answer has been filed. Several courts have allowed post-answer motions to dismiss

---

<sup>2</sup> Failure to respond constitutes consent to an adverse order. LR 7.1(e).

<sup>3</sup> Because the Board asserted the affirmative defense of failure to exhaust administrative remedies, which the Court construes as a lack-of-subject-matter-jurisdiction defense, in its Answer, that defense was not waived. Fed. R. Civ. P. 12(h)(1) (recognizing that a party waives the defense of lack of subject-matter jurisdiction if it does not assert that defense in its answer or by pre-answer motion).

1 based on grounds asserted as defenses in the answer. See *Telesca v. Long*  
2 *Island Hous. P'ship*, 443 F. Supp. 2d 397, 405 (E.D.N.Y. 2006); *Molnlycke*  
3 *Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F. Supp. 2d 448,  
4 449 n.1 (E.D. Pa. 1999). Other courts insist that post-answer Rule 12(b)  
5 motions to dismiss are untimely. See *Augustine v. United States*, 704  
6 F.2d 1074, 1075 n.3 (9th Cir. 1983); *Byrne v. Nezhat*, 261 F.3d 1075, 1093  
7 n.35 (11th Cir. 2001). Here, the Court recognizes that the Board's  
8 motion is "properly before the court as a Rule 12(h)(3) suggestion of  
9 lack of subject matter jurisdiction." *Augustine v. United States*, 704  
10 F.2d 1074, 1075 n.3 (9th Cir. 1983).

11 Courts may rely upon declarations or other evidence and "resolve  
12 factual disputes where necessary." *Id.* (quoting *Augustine*, 704 F.2d at  
13 1077). And although normally "[n]o presumptive truthfulness attaches to  
14 the plaintiff's allegations," *id.*, if the motion is resolved on  
15 declarations alone and without an evidentiary hearing, the complaint's  
16 factual allegations must be accepted as true. *McLachlan v. Bell*, 261  
17 F.3d 908, 909 (9th Cir. 2001). But "[a] court is required to convert a  
18 Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or Rule 56  
19 summary judgment motion when resolution of the jurisdictional question  
20 is intertwined with the merits of the case." *Islands, Inc. v. U.S.*  
21 *Bureau of Reclamation*, 64 F. Supp. 2d 966, 968 (E.D. Cal. 1999), *vacated*  
22 *on other grounds*, 2001 WL 503478 (9th Cir. 2001).

23 Here, the Board's motion to dismiss the FOIA claims involves  
24 jurisdictional questions that are intertwined with the merits. Yet,  
25 these questions do not involve resolution of factual questions going to  
26 the merits and thus the motion need not be treated as a summary judgment

1 motion. See *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d  
2 138, 139 (9th Cir. 1983).

3 **B. Motion to Dismiss for Lack of Subject-Matter Jurisdiction**

4 Under the FOIA, the district court "has jurisdiction to enjoin the  
5 agency from withholding agency records and to order the production of any  
6 agency records improperly withheld from the complainant." 5 U.S.C. §  
7 552(a)(4)(B). But before a party can seek judicial review, it must  
8 exhaust its administrative remedies under the FOIA. *In re Steele*, 799  
9 F.2d 461, 465 (9th Cir. 1986). If it does not, the district court lacks  
10 subject-matter jurisdiction over the FOIA lawsuit. *Id.* at 466; see also  
11 *Hymen v. Merit Sys. Prot. Bd.*, 799 F.2d 1421, 1423 (9th Cir. 1986)  
12 (overruled on other grounds) (finding "[t]he district court . . .  
13 properly dismissed the FOIA claims for lack of subject matter  
14 jurisdiction" where the requester failed to exhaust). A requester fails  
15 to exhaust her administrative remedies if he submits an improper FOIA  
16 request. *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir.  
17 1978).

18 The Board alleges that Mr. Weirich's request was improper and, thus,  
19 he failed to exhaust his administrative remedies thereby depriving this  
20 Court of subject-matter jurisdiction over his FOIA claim. A proper FOIA  
21 request must "reasonably describe[]" the records sought and must be "made  
22 in accordance with published rules stating the time, place, fees (if any)  
23 and procedures to be followed . . . ." 5 U.S.C. § 552(a)(3)(A). The  
24 Board's regulations similarly require requests to "reasonably describe  
25 the records in a way that enables the Board's staff to identify and  
26 produce the records with reasonable effort and without unduly burdening  
or significantly interfering with any of the Board's operations." 12

1 C.F.R. § 261.12(b). Those regulations also provide: "The Board need not  
2 accept or process a request that does not reasonably describe the records  
3 requested or that does not otherwise comply with the requirements of this  
4 section. The Board may return a defective request, specifying the  
5 deficiency." *Id.*

6 Here, the Court recognizes that Mr. Weirich's August 2, 2009 and  
7 November 2, 2009 requests and items (c) and (d) of his September 15, 2009  
8 request do not reasonably describe the records sought. Not only do they  
9 lack specificity, but they would unduly burden the FOI Office and  
10 significantly interfere with the Board's operations. Yet despite Mr.  
11 Weirich's non-compliance with FOIA, it appears that Mr. Weirich has not  
12 failed to exhaust his administrative remedies. Under the FOIA, if the  
13 agency fails to comply with FOIA's time limits in responding to a  
14 request, the requester is deemed to have exhausted its administrative  
15 remedies with respect to that request. 5 U.S.C. § 552(a)(6)(C)(i).

16 Here, the Board failed to timely comply. Within twenty working days  
17 of receipt of Mr. Weirich's requests, the Board was required to  
18 immediately notify Mr. Weirich whether it intended to comply with the  
19 request. 5 U.S.C. § 552(a)(6)(A)(i). The Board's August 4, September  
20 16, and November 10, 2009 acknowledgment letters simply acknowledged  
21 receipt of Mr. Weirich's request; they did not indicate when or whether  
22 the Board would respond to his request. Shortly thereafter, the Board  
23 complied with 5 U.S.C. § 552(a)(6)(B)(i) when it notified Mr. Weirich  
24 that it was extending the time period for response for ten days to  
25 consult with another agency due to the unusual circumstances of the  
26 request. However, the Board fell out of compliance with FOIA's time  
limits when it did not notify Mr. Weirich that his request could not be

1 processed within the time limit. Under 5 U.S.C. § 552(a)(6)(B)(ii), the  
2 Board was required to 1) notify Mr. Weirich that his request could not  
3 be processed within the ten-day extension, and 2) allow him to either  
4 limit his request so that it could be processed within the time limit or  
5 arrange for an alternative time frame. The Board did not contact Mr.  
6 Weirich until April 20, 2010, after the time for response had expired and  
7 after the instant action had been filed.

8 Even if unusual circumstances existed which would have made  
9 responding to Mr. Weirich's request particularly difficult, the Board did  
10 not comply with the FOIA's statutory time requirements. And because  
11 under FOIA a requester is deemed to have exhausted his administrative  
12 remedies if the agency does not comply with time limits, Mr. Weirich  
13 appears to have exhausted his administrative remedies and appropriately  
14 filed this action to enjoin the Board from withholding the records.

15 **NO LATER THAN November 9, 2010**, the Board shall file written  
16 argument not to exceed ten (10) pages demonstrating why, given the  
17 Board's apparent non-compliance with the FOIA's statutory time  
18 requirements, this case should be dismissed for lack of subject-matter  
19 jurisdiction.

#### 20 **IV. Conclusion**

21 For the foregoing reasons, **IT IS HEREBY ORDERED:**

22 1. Defendant Board of Governors of the Federal Reserve System's  
23 Motion to Dismiss for Lack of Subject Matter Jurisdiction (**ECF No. 9**) is  
24 **HELD IN ABEYANCE.**

25 2. **NO LATER THAN November 9, 2010**, the Board shall file written  
26 argument not to exceed ten (10) pages demonstrating why, given the  
Board's apparent non-compliance with the FOIA's statutory time

1 requirements, this case should be dismissed for lack of subject-matter  
2 jurisdiction.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
4 this Order and to distribute copies to Plaintiff and counsel.

5 **DATED** this 2<sup>nd</sup> day of November 2010.

6  
7 S/ Edward F. Shea  
8 EDWARD F. SHEA  
United States District Judge

9 Q:\Civil\2010\5031.Dismiss.Defendant.Show.Cause.wpd  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26